

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Dr. ANNA VERTKIN,) Case No. 07-4471 SC
)
Plaintiff,)
)
v.) ORDER GRANTING IN
) PART AND DENYING IN
) PART DEFENDANT'S
MICHAEL VERTKIN, and Does 1-20,) MOTION TO DISMISS
)
Defendants.)
)
_____)

I. INTRODUCTION

This matter comes before the Court on pro se Defendant Michael Vertkin's Motion to Dismiss ("Motion"). See Docket No. 3. Plaintiff Dr. Anna Vertkin filed an Opposition and Defendant submitted a Reply. See Docket Nos. 9, 11.

For the following reasons, the Court GRANTS IN PART and DENIES IN PART Defendant's Motion.

II. BACKGROUND

This action arises out of the ugly disintegration of a 30-year marriage. Through August 2006, Plaintiff and Defendant were married and residing in the same house in Mill Valley, California. Compl., Docket No. 1, ¶ 2. On September 20, 2006, a restraining order was issued by the Marin County Superior Court against Defendant, directing that he was not to remove, transfer, or

1 otherwise alter any financial accounts held between him and
2 Plaintiff. Id. ¶ 9. On September 26, 2006, Defendant filed a
3 petition for dissolution of marriage. Mot. ¶ 1. This petition is
4 still pending in the Marin County Superior Court due to numerous
5 motions, petitions and delays, none of which is relevant to the
6 issue at hand. Id.

7 On August 29, 2007, Plaintiff filed the present Complaint in
8 this Court. Plaintiff alleges that Defendant installed various
9 types of tracking software on Plaintiff's computers and
10 subsequently interfered with Plaintiff's email accounts. Compl.
11 ¶¶ 10-14. Plaintiff raises seven causes of action: (1)
12 intentional disclosure under 18 U.S.C. § 2511; (2) intentional use
13 under 18 U.S.C. § 2511; (3) falsification of Plaintiff's mailing
14 address under 18 U.S.C. § 1001; (4) obtaining individually
15 identifiable health information under false pretenses, under 42
16 U.S.C. § 1320(d)(6);¹ (5) violations of California Business and
17 Professions Code § 22947.2(b)(1); (6) trespass to chattel under
18 California tort law; and (7) invasion of privacy and intrusion of
19 solitude under California tort law. See Compl.

20 Defendant has moved to dismiss the Complaint for lack of
21 subject matter jurisdiction, failure to state a claim and res

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23 ¹ Although Plaintiff pleads this cause of action as arising
24 under "42 U.S.C. 1301, PART C § 1177," Compl. § 24, such a statute
25 does not exist. However, Plaintiff also references the Health
26 Insurance Portability and Accountability Act ("HIPAA") under this
27 cause of action. HIPAA is Public Law 104-191 and contains Part C,
28 Section 1177, which is titled "Wrongful disclosure of individually
identifiable health information." Pub. L. 104-191, Part C, Sec.
1177. This section was codified as 42 U.S.C. § 1320d-6. The Court
therefore interprets Plaintiff's fourth cause of action as alleging
violations of 42 U.S.C. § 1320d-6, not § 1301.

1 judicata.

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3 **III. LEGAL STANDARD**

4 Federal Rule of Civil Procedure 12(b)(6) states that a motion
5 to dismiss may be granted if the plaintiff fails "to state a claim
6 upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).
7 When evaluating a motion to dismiss, the court accepts the facts
8 as stated by the nonmoving party and draws all inferences in its
9 favor. Everest & Jennings, Inc. v. Am. Motorists Ins. Co., 23
10 F.3d 226, 228 (9th Cir. 1994). In addition, courts must assume
11 that all general allegations "embrace whatever specific facts
12 might be necessary to support them." Peloza v. Capistrano Unified
13 Sch. Dist., 37 F.3d 517, 521 (9th Cir. 1994). At the pleading
14 stage, the plaintiff "need only show that the facts alleged, if
15 proved, would confer standing upon him." Warren v. Fox Family
16 Worldwide, Inc., 328 F.3d 1136, 1140 (9th Cir. 2003).

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18 **IV. DISCUSSION**

19 **A. Subject Matter Jurisdiction**

20 Several of Plaintiff's causes of action are brought under
21 statutes that provide no private right of action and must
22 therefore be dismissed.

23 Plaintiff's third cause of action alleges that Defendant
24 violated 18 U.S.C. § 1001 by falsifying a change in Plaintiff's
25 mailing address. Section 1001 provides, in pertinent part:

26 [W]hoever, in any matter within the
27 jurisdiction of the executive,
28 legislative, or judicial branch of the

Government of the United States, knowingly and willfully -- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; [or] (2) makes any materially false, fictitious, or fraudulent statement or representation . . . shall be fined under this title [or] imprisoned not more than 5 years

18 U.S.C. § 1001(a). Nowhere does the statute provide a private right of action. The few other courts to have addressed this issue have also failed to uncover a private right of action under this statute. See, e.g., Williams v. McCausland, 791 F. Supp. 992, 1001 (E.D.N.Y. 1992) (stating that "[n]o private right of action is provided under this statute"). Plaintiff's Third Cause of Action is therefore DISMISSED with prejudice.

Plaintiff's fourth cause of action alleges that Defendant violated Plaintiff's rights under 42 U.S.C. § 1320d-6 by "obtaining individually identifiable health information under false pretenses" of Plaintiff's patients. Compl. ¶ 28. Section 1320d-6 states, in relevant part:

A person who knowingly . . . obtains individually identifiable health information relating to an individual . . . shall be . . . fined not more than \$50,000, imprisoned not more than 1 year, or both

42 U.S.C. § 1320d-6. The Court discerns no private right of action under this statute. Other courts that have examined this issue have found the same. See, e.g., Johnson v. Quander, 370 F. Supp. 2d 79, (D.D.C. 2005) (finding no private right of action under § 1320d-6 and stating that "[w]hile only a handful of courts have examined whether a private right of action is implied under HIPAA, each court has rejected the position"); see also id.

(listing decisions by other courts finding no private right of action). Therefore, Plaintiff's Fourth Cause of Action is DISMISSED with prejudice.

Plaintiff's First and Second Causes of Action are brought under criminal statute 18 U.S.C. § 2511. Although § 2511 itself does not provide a private right of action, courts have found that § 2520(a) "expressly allows private civil suits by any person whose electronic communication is intercepted in violation" of § 2511. DirectTV, Inc., v. Bennet, 470 F.3d 565, 567 (5th Cir. 2006); see also DirectTV, Inc. v. Nicholas, 403 F.3d 223 (4th Cir. 2005) (holding the same). Accordingly, the Court has jurisdiction over these causes of action and will therefore analyze them pursuant to Defendant's Motion for failure to state a claim and res judicata.

B. Failure To State A Claim

1. First and Second Causes of Action

Plaintiff's First and Second Causes of Action are brought under 18 U.S.C. § 2511 and allege that Defendant used software to track Plaintiff's keystrokes on her computer and then used the information obtained from this software for various financial gains.

Section 2511 states, in part:

[A]ny person who . . . intentionally discloses . . . the contents of any . . . electronic communication, knowing or having reason to know that the information was obtained through the interception of a[n] . . . electronic communication in violation of this subsection . . . or intentionally uses . . . the contents of any . . . electronic

communication . . . shall be punished as
provided in subsection (4) or shall be
subject to suit . . . by the Federal
Government.
18 U.S.C. § 2511.

Plaintiff has satisfied the pleading requirements for these claims and Defendant's Motion to dismiss Plaintiff's First and Second Causes of Action for failure to state a claim is DENIED.

2. Fifth Cause of Action

Plaintiff's Fifth Cause of Action alleges violations of California Business and Professions Code section 22947.2(b)(1). Section 22947.2 states, in part:

A person or entity that is not an authorized user . . . shall not, with actual knowledge, . . . cause computer software to be copied onto the computer of a consumer . . . and use the software to do any of the following: . . . (b) Collect, through intentionally deceptive means, personally identifiable information that meets any of the following criteria: (1) It is collected through the use of a keystroke-logging function that records all keystrokes made by an authorized user who uses the computer and transfers that information from the computer to another person.

Cal. Bus. and Profs. Code § 22947.2(b)(1).

Plaintiff alleges that Defendant installed 'keystroke' software on the home and office computers of Plaintiff and obtained Plaintiff's personal financial information from this software. Plaintiff, therefore, has alleged a cause of action and Defendant's Motion to Dismiss the Fifth Cause of Action is DENIED.

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3. Sixth Cause of Action

Plaintiff's Sixth Cause of Action is a California tort law claim for trespass to chattel. Plaintiff alleges that by installing computer programs onto Plaintiff's computer in order to obtain personal information, Defendant intermeddled with Plaintiff's property. "Short of dispossession, personal injury, or physical damage . . . , intermeddling is actionable [as trespass to chattels] only if the chattel is impaired as to its condition, quality, or value, or the possessor is deprived of the use of the chattel for a substantial time. Intel Corp. v. Hamidi, 30 Cal. 4th 1342, 1357 (2003) (internal quotations marks omitted).

In the present case, Plaintiff's allegations fall short of what is required to state a colorable trespass to chattels claim. The only harm alleged by Plaintiff was a result of the information that Defendant allegedly procured from Plaintiff's computers. Plaintiff has failed to allege that her computers were impaired as to their condition or quality or that she was unable to use these computers for a substantial period of time. Accordingly, Plaintiff's Sixth Cause of Action for trespass to chattel is DISMISSED with prejudice.

4. Seventh Cause of Action

Plaintiff's Seventh Cause of Action is for invasion of privacy and intrusion of solitude under California tort law. Specifically, Plaintiff alleges that Defendant's installation of software on Plaintiff's computers with the intent of obtaining information from these computers was an offensive invasion and therefore actionable as a tort.

1 Intrusion into solitude or seclusion requires allegations
2 that "one intentionally . . . intrudes, physically or otherwise,
3 upon the solitude or seclusion of another or his private affairs
4 or concerns . . . if the intrusion would be highly offensive to a
5 reasonable person." Taus v. Loftus, 40 Cal. 4th 683, 724 (2007)
6 (internal quotation marks omitted). The action for intrusion has
7 two elements: "(1) intrusion into a private place, conversation or
8 matter, (2) in a manner highly offensive to a reasonable person."
9 Id. (internal quotation marks omitted). A plaintiff must
10 demonstrate that "the defendant penetrated some zone of physical
11 or sensory privacy surrounding, or obtained unwanted access to
12 data about, the plaintiff." Id. at 725. Plaintiff has
13 sufficiently alleged this cause of action and Defendant's Motion
14 to Dismiss the Seventh Cause of Action is DENIED.

15 **C. Res Judicata**

16 "In order to bar a later suit under the doctrine of res
17 judicata, an adjudication must (1) involve the same claim as the
18 later suit, (2) have reached the final judgment on the merits, and
19 (3) involve the same parties or their privies." Nordhorn v.
20 Ladish Co., Inc., 9 F.3d 1402, 1404 (9th Cir. 1993). Defendant
21 bases his Motion to Dismiss for res judicata on the dismissal, by
22 the Marin County Superior Court, of the temporary restraining
23 order that had been imposed against Defendant. Such an action,
24 however, is not a final judgment on the merits and, as far as this
25 Court can tell, did not involve the same claims presented here.
26 Therefore, Defendant's Motion to Dismiss for res judicata is
27 DENIED.

1 **V. CONCLUSION**

2 For the reasons discussed herein, the Court GRANTS IN PART
3 and DENIES IN PART Defendant's Motion to Dismiss and DISMISSES
4 Plaintiff's Third, Fourth and Sixth Causes of Action with
5 prejudice.²

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8 IT IS SO ORDERED.

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10 Dated: December 6, 2007



11 UNITED STATES DISTRICT JUDGE
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23 ² It is the Court's understanding that the divorce
24 proceedings between Plaintiff and Defendant are still pending in
25 Marin County Superior Court, more than one year after they were
26 initiated. It is also the Court's understanding that these
27 proceedings are, at best, less than cordial. With this backdrop,
28 the Court reminds the parties that representations to the Court,
including pleadings and motions, may not be made for any improper
purpose, including harassment, unnecessary delay, or needless
increase in the cost of litigation. See Fed. R. Civ. P. 11.